CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 30 **APRIL 3, 1996** **NO. 14**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washing-ton, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 3–1996)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of February 1996 follow. The last notice was published in the CUSTOMS BULLETIN on March 13, 1996.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: March 20, 1996.

JOHN F. ATWOOD,
Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9600052	19960205	20160205	JYHAD	WIZARD OF THE COAST INC.	N
COP9600053	19960209	20160209	WEAZEL BALL	DAH YANG TOY INDUSTRIAL CO., LTD	N
COP9600054	19960222	20160222	NOAH'S ARK TEA SET COLLECTION	YOUNGS, INC.	N
COP9600055	19960222	20160222	CAT MINIATURE TEA SET COLLECTION	YOUNGS, INC.	N
COP9600056	19960222	20160222	RABBIT MINIATURE TEA SET COLLECTION	YOUNGS, INC.	N
COP9600057	19960222	20160222	COW MINIATURE TEA SET COLLECTION	YOUNGS, INC.	N
COP9600058	19960222	20160222	MTV'S BEAVIS & BUTT-HEAD STYLE GUIDE	VIACOM INTERNATIONAL INC.	N
COP9600059	19960222	20160222	MTV'S BEAVIS & BUTT-HEAD	VIACOM INTERNATIONAL INC.	N
COP9600060	19960223	20160223	MERCHANDISE INNOVATIONS SHADE	ABRAHAM LEVY	N
COP9600061	19960223	20160209	TIN STAR (SUPER NES VERSION)	NINTENDO OF AMERICA INC.	N
COP9600062	19960223	20160223	LARGE REALISTIC PUMPKIN	TRENDMASTERS INC.	N
COP9600063	19960223	20160223	SMALL REALISTIC PUMPKIN	TRENDMASTERS INC.	N
COP9600064	19960223	20160223	PUMPKIN LIGH-UP TOTEM POLE	TRENDMASTERS INC.	N
COP9600065	19960223	20160223	1995 HALLOWEEN REALISTIC SCARY PUMPKIN	TRENDMASTERS INC.	N
COP9600066	19960223	20160223	1995 HALLOWEEN REALISTIC HAPPY PUMPKIN	TRENDMASTERS INC.	N
COP9600067	19960223	20160223	CANDELABRA	TRENDMASTERS INC.	N
COP9600068	19960223	20160223	1995 HALLOWEEN HAUNTED TREE TOTEM POLE	TRENDMASTERS INC.	N
COP9600069	19960223	20160223	SKULL LIGHT-UP TOTEM POLE	TRENDMASTERS INC.	N
COP9600070	19960223	20160223	GRIFFIN DOOR KNOCKER	TRENDMASTERS INC.	N
COP9600071	19960227	20160214	THUNDER WARRIOR	CBB GROUP INC.	N
COP9600072	19960227	20160227	SCHOOL DAYS I	JUDI BOISSON	N
COP9600073	19960227	20160227	SCHOOL DAYS II	JUDI BOISSON	N
SUBTOTAL RECORDATION TYPE		ZZ			
TMK9600020	19960213	20021110	DYNA BEE	DEFER INC.	N
TMK9600021	19960222	20030202	LAMIGLAS	LAMIGLAS INC.	Y
TMK9600022	19960222	20050822	US SOCCER & DESIGN	UNITED STATES SOCCER FEDERATION	N
TMK9600023	19960222	20050912	US COACH & DESIGN	UNITED STATES SOCCER FEDERATION	N
TMK9600024	19960222	20050718	US WOMEN'S NATIONAL TEAM & DESIGN	UNITED STATES SOCCER FEDERATION	N
TMK9600025	19960222	20051219	US SOCCER AMATEUR DIVISION & DESIGN	UNITED STATES SOCCER FEDERATION	N
TMK9600026	19960222	20050725	US YOUTH SOCCER & DESIGN	UNITED STATES SOCCER FEDERATION	N
TMK9600027	19960222	20000612	CONFIGURATION OF A CRAWFISH FISHING LURE	EBSCO INDUSTRIES INC.	N
TMK9600028	19960222	20050912	WINTERFRESH & DESIGN	W.M. WRIGLEY JR. COMPANY	N
TMK9600029	19960222	20030424	P.K.	W.M. WRIGLEY JR. COMPANY	N
TMK9600030	19960222	20050629	JUICY FRUIT	W.M. WRIGLEY JR. COMPANY	N
TMK9600031	19960222	20020424	PLEN T PAK	W.M. WRIGLEY JR. COMPANY	N
TMK9600032	19960222	20041209	WRIGLEY'S	W.M. WRIGLEY JR. COMPANY	N
TMK9600033	19960222	20081227	WINTERFRESH	W.M. WRIGLEY JR. COMPANY	N
TMK9600034	19960222	20031016	BIG RED WRAPPER DESIGN	W.M. WRIGLEY JR. COMPANY	N
TMK9600035	19960222	20031009	BIG RED	W.M. WRIGLEY JR. COMPANY	N
TMK9600036	19960222	20050129	EXTRA WRAPPER DESIGN	W.M. WRIGLEY JR. COMPANY	N
TMK9600037	19960222	20050119	DOUBLEMINT	W.M. WRIGLEY JR. COMPANY	N
TMK9600038	19960222	20040315	WINBOOK	MICRO ELECTRONICS INC.	N
TMK9600039	19960222	20060708	MTV MUSIC TELEVISION LOGO	VIACOM INTERNATIONAL INC.	N
TMK9600040	19960222	20051126	MTV MUSIC TELEVISION LOGO	VIACOM INTERNATIONAL INC.	N
TMK9600041	19960222	20051210	MTV MUSIC TELEVISION LOGO	VIACOM INTERNATIONAL INC.	N
TMK9600042	19960222	20031203	MTV MUSIC TELEVISION LOGO	VIACOM INTERNATIONAL INC.	N
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TMK9600044	19960222	20000918	BERSA	EAGLE IMPORTS INC.	Y
TMK9600045	19960222	20051003	TEMPUR MED	FAGERDALA WORLD FOAMS AB	N
TMK9600046	19960222	20040906	TEMPUR-PEDIC	FAGERDALA WORLD FOAMS AB	N
TMK9600047	19960222	20051010	TEMPUR	FAGERDALA WORLD FOAMS AB	N
TMK9600048	19960223	20060114	SILVER SWAN AND DESIGN	SILVER SWAN MANUFACTURING CO.	N
TMK9600049	19960223	20040913	EUROCASTWAN AND DESIGN	AMERICAN STANDARD INC.	Y
TMK9600050	19960223	20060603	THE PRINT SHOP	BRODERBUND SOFTWARE, INC.	N
TMK9600051	19960223	20041127	BRODERBUND SOFTWARE	BRODERBUND SOFTWARE, INC.	N
TMK9600052	19960223	20030511	AIRPORT GRADE	DALTON ENTERPRISES, INC.	N
TMK9600053	19960223	20070331	LATEX-ITE	DALTON ENTERPRISES, INC.	N
TMK9600054	19960223	20030511	LV MONOGRAM	LOUIS VUITTON MALLETIER	N
TMK9600055	19960223	20051214	FONNES	FONNES BROTHERS & CO.	Y
TMK9600056	19960223	20050830	BINOLUX	COMPASS INDUSTRIES INC.	N
TMK9600057	19960223	20050919	MAGIC THE GATHERING	WIZARDS OF THE COAST INC.	N
TMK9600058	19960223	20090502	CONFIGURATION OF A TOUMA BOTTLE	RACHID T. TOUMA & FRERES	N
TMK9600059	19960223	20080502	TOUMA	RACHID T. TOUMA & FRERES	N
TMK9600060	19960223	20090912	TOUMA & FRENES & DESIGN	RACHID T. TOUMA & FRERES	N
TMK9600061	19960223	20070331	KING OF ARAK	RACHID T. TOUMA & FRERES	N
TMK9600062	19960223	20040322	EXPRESSIONS KIDS	ALMAR SALES CO., INC.	Y
TMK9600063	19960223	20020929	EXPRESSIONS KIDS	ALMAR SALES CO., INC.	Y
TMK9600064	19960223	20020428	EXPRESSIONS KIDS	ALMAR SALES CO., INC.	Y
TMK9600065	19960223	20040322	EXPRESSIONS	ALMAR SALES CO., INC.	Y
TMK9600066	19960223	20021013	EXPRESSIONS	ALMAR SALES CO., INC.	Y
TMK9600067	19960223	20030928	LV LOGO	VITTON MALLETIER	N
TMK9600068	19960223	20120505	"DONA MARIA"	HERDEZ S.A. DE C.V.	N
TMK9600069	19960223	19970405	DONA MARIA	HERDEZ S.A. DE C.V.	N
TMK9600070	19960223	20030416	HERDEZ	HERDEZ S.A. DE C.V.	N
TMK9600071	19960223	20051014	LINDA	TRANSAGRICOLA S.A.	N
TMK9600072	19960227	20050906	RED INNER RIM OF LOCK NUT	MACLEAN ESNA L.P.	N
TMK9600073	19960227	20040621	METALLICA	METALLICA	Y
TMK9600074	19960227	20040201	METALLICA	METALLICA	Y
TMK9600075	19960227	20020901	YSL MONOGRAM	YVES SAINT LAURENT FASHION B.V.	N
TMK9600076	19960227	20030112	YVES SAINTLAURENT	YVES SAINT LAURENT FASHION B.V.	N
TMK9600077	19960228	20040624	EROX	EROX CORPORATION	Y
TMK9600078	19960229	20020421	V2 BY VERSACE AND DESIGN	GIANNI VERSACE S.P.A.	N
TMK9600079	19960229	20010416	VERSATILE & GV & DESIGN	GIANNI VERSACE S.P.A.	N
TMK9600080	19960229	20020630	V'E VERSACE	GIANNI VERSACE S.P.A.	N
TMK9600081	19960229	20010709	VERSUS DESIGN	GIANNI VERSACE S.P.A.	N
TMK9600082	19960229	20031221	VERSUS GIANNI VERSACE	GIANNI VERSACE S.P.A.	N
TMK9600083	19960229	20040809	MODUSA HEAD DESIGN	GIANNI VERSACE S.P.A.	N
TMK9600084	19960229	20021117	MODUSA HEAD DESIGN	GIANNI VERSACE S.P.A.	N
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TMK9600086	19960229	20010416	GIANNI VERSACE	GIANNI VERSACE S.P.A.	N
TMK9600087	19960229	20071006	GIANNI VERSACE	GIANNI VERSACE S.P.A.	N
TMK9600088	19960229	19990807	GIANNI VERSACE	GIANNI VERSACE S.P.A.	N
TMK9600089	19960229	20031018	GIANNI VERSACE	GIANNI VERSACE S.P.A.	N
TMK9600090	19960229	20090530	GIANNI VERSACE	GIANNI VERSACE S.P.A.	N
TMK9600091	19960229	20050319	NITTANY LIONS	PENNSYLVANIA STATE UNIVERSITY	Y
TMK9600092	19960229	20021117	PENNSTATE & DESIGN	PENNSYLVANIA STATE UNIVERSITY	Y

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U.S. CUSTOMS SERVICE
IPR RECORDATIONS ADDED IN FEBRUARY 1996

PAGE 3
DETAIL

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9600093	19960229	20051119	DESIGN OF A NITTANY MOUNTAIN LION HEAD	PENNSYLVANIA STATE UNIVERSITY	Y
TMK9600094	19960229	20041211	PENN STATE	PENNSYLVANIA STATE UNIVERSITY	Y
TMK9600095	19960229	20040508	PUS	PENNSYLVANIA STATE UNIVERSITY	Y
TMK9600096	19960229	20040508	THE PENNSYLVANIA STATE UNIVERSITY 1855	PENNSYLVANIA STATE UNIVERSITY	Y
TMK9600097	19960229	20071013	NSC	N.C. STATE UNIVERSITY AT RALEIGH	Y
TMK9600098	19960229	20040117	DESIGN OF A WOLF	N.C. STATE UNIVERSITY AT RALEIGH	Y
TMK9600099	19960229	20031227	N.C. STATE	N.C. STATE UNIVERSITY AT RALEIGH	Y
TMK9600100	19960229	20040501	CONFIGURATION OF AN INDIAN HEAD	FLORIDA STATE UNIVERSITY	Y
TMK9600101	19960229	20040403	FANCIFUL REPRESENTATION OF A FEMALE INDIAN	FLORIDA STATE UNIVERSITY	Y
TMK9600102	19960229	20050228	CONFIGURATION OF A RUNNING INDIAN	FLORIDA STATE UNIVERSITY	Y
TMK9600103	19960229	20040403	SEMINOLE	FLORIDA STATE UNIVERSITY	Y
TMK9600104	19960229	20010917	DESIGN OF A ROOSTER	UNIVERSITY OF SOUTH CAROLINA	Y
TMK9600105	19960229	20010528	UNIVERSITY OF CAROLINA	UNIVERSITY OF SOUTH CAROLINA	Y

SUBTOTAL RECORDATION TYPE 86

TOTAL RECORDATIONS ADDED THIS MONTH 108

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, March 19, 1996.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

PATRICIA A. TODARO,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

REVOCATION AND MODIFICATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF COATED POLYPROPYLENE FABRIC

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation and modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is respectively revoking and modifying two ruling letters pertaining to the tariff classification of coated polypropylene fabric. Notice of the proposed revocation and modification was published February 14, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 7.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after June 3, 1996.

FOR FURTHER INFORMATION CONTACT: Suzanne Karateew, Textile Branch, Office of Regulations and Rulings, (202) 482–7047.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 14, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Number 7, proposing to revoke New York Ruling Letter (NYRL) 891702 (11/19/93), and to modify Headquarters Ruling Letter (HRL) 958462 (11/2/95). In Mm 891702, Customs classified fab-

ric made of woven polypropylene strip laminated with clear polypropylene under subheading 5407.20.0000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for "[w]oven fabrics of synthetic filament yarn, including woven fabrics obtained from materials of heading 5404, woven fabrics obtained from strip or the like. Upon reexamination of the subject fabric, Customs found the fabric to be visibly coated to the naked eye and thereby classifiable as a coated fabric of man-made fibers within subheading 5903.90.2500, HTSUSA. In HRL 958462, Customs classified four styles of plastic coated fabric under subheading 5903.90.2500, HTSUSA. After the issuance of that ruling, Customs learned that the recipient of HRL 958462 was also the recipient of NYRL 891702, dated November 19, 1993, in which three of the identical fabrics at issue in HRL 958462 were classified under subheading 5407.20.0000, HTSUSA. The issuance of a *de novo* binding classification ruling was inappropriate where the recipient had previously been issued a conflicting, unrevoked ruling on identical merchandise. HRL 958462 should have been issued as a revocation of NYRL 891702 pursuant to the requirements of section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057). Accordingly, HRL 958462 is modified. The classification of the 3.0, 6.5 and 8.0 ounce coated polypropylene fabrics set forth in HRL 958462 is revoked as these fabrics were previously classified in NYRL 891702. The classification of the 5.0 ounce fabric set forth in HRL 958462 remains unmodified inasmuch as this fabric was not previously classified in NYRL 891702. No comments were received from interested parties.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is respectively revoking and modifying NYRL 891702 (11/19/93) and HRL 958462 (11/2/95). HRL's 958702 and 958703, which respectively serve to revoke and modify the above cited rulings, are set forth in Attachments A and B to this notice.

Publication of rulings or decisions pursuant to section 625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: March 19, 1996.

JOHN B. ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 19, 1996.

RR:TC:TE 958702 SK
Category: Classification
Tariff No. 5903.90.2500

RAFAEL QUIROZ, JR.
INTERNATIONAL CUSTOMS SERVICES
7100 San Bernardo, Ste. 307
P.O. Box 3259
Laredo, TX 78044

Re: Revocation of NYRL 891702 (11/19/93); classification of coated fabric; Note 2(a)(1) to Chapter 59; heading 5903, HTSUSA; coating rendered visible to the naked eye if manually separable from underlying fabric.

DEAR MR. QUIROZ:

On November 19, 1993, the New York port issued you New York Ruling Letter (NYRL) 891702 in which Customs classified three different weights of coated fabric under subheading 5407.20.0000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Upon reconsideration, this office deems that classification to be in error. Our analysis follows.

Facts:

The merchandise at issue in NYRL 891702 consists of three different weights of woven fabric made of polypropylene material laminated on one side with a thin, clear film of polypropylene plastic. The specifications of the subject materials are as follows:

1. Fabric Construction:

100% Polypropylene Material
3.0 oz. 10.2 × 10.2 threads/inch
6.5 oz. 12.0 × 11.2 threads/inch
8.5 oz. 13.0 × 13.0 threads/inch

2. Weights of Coating/Laminating Substances:

3.0 oz.	coating	=	21 grams/square meter
	fabric	=	91 grams/square meter
6.5 oz.	coating	=	21 grams/square meter
	fabric	=	250 grams/square meter
8.5 oz.	coating	=	21 grams/square meter
	fabric	=	277 grams/square meter

3. Weights of Coated Fabric Per Square Meter:

3.0 oz.	=	112 grams/square meter
6.5 oz.	=	271 grams/square meter
8.5 oz.	=	298 grams/square meter

This office is in possession of samples of all three fabric weights in both their coated and uncoated states. The strips of all materials, both coated and uncoated, are of a high saturation white hue with shiny surface. The strips are somewhat translucent and have been crimped or folded from wider widths giving them a certain degree of thickness.

Issue:

Whether the coating on the subject fabrics is visible to the naked eye so as to warrant classification under heading 5903, Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Classification of merchandise under the HTSUSA is in accordance with the General Rules of Interpretation (GRI's), taken in order. GRI 1 provides that classification shall be in accordance with the terms of the headings and any relevant section or chapter notes.

Where goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may he applied in the order of their appearance.

Heading 5903, HTSUSA, provides for "[T]extile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902." Chapter Note 2(a)(1) to Chapter 59 states that heading 5903 precludes:

> "[F]abrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually chapters 50 to 55, 58 or 60); for the purpose of this provision, no account should be taken of any resulting change of color."

The sole criterion upon which Customs is to determine whether fabric is coated for purposes of classification under heading 5903, HTSUSA, is based on visibility: coated fabric is classifiable in this heading if the coating is visible to the naked eye. This standard does not allow the examiner to take the "effects" of coating into account. Coating will often result in a change of color, or increase a fabric's stiffness; these are factors which, while indicative of the presence of a coating, may not be taken into account in determining whether the plastic itself is visible to the naked eye.

In the instant analysis, examination of the subject fabrics yields the finding that they are visibly coated with plastic. The translucent plastic laminate is manually separable from the underlying woven polypropylene strip on all three of the subject fabrics. It is on this basis that Customs deems the subject fabrics visibly coated.

Holding:

NYRL 891702 is revoked.

The three fabric weights are classifiable under subheading 5903.90.2500, HTSUSA, which provides for "[T]extile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: other of man-made fibers: other: other," dutiable at a rate of 8.4 percent *ad valorem*. The textile quota category is 229.

The designated textile and apparel categories may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at a local Customs office.

Due to the nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact a local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

All future requests for binding classification rulings concerning plastic coated fabrics should be accompanied by samples of the subject fabric in both their coated and uncoated states.

In accordance with section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulation (19 CFR 177.10(c)(1)).

JOHN B. ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 19, 1996.

RR:TC:TE 958703 SK
Category: Classification
Tariff No. 5903.90.2500

RAFAEL QUIROZ, JR.
INTERNATIONAL CUSTOMS SERVICES
7100 San Bernardo, Suite 307
P.O. Box 3259
Laredo, TX 78044

Re: Modification of HRL 958462 (11/2/95); issuance of a *de novo* binding classification ruling inappropriate where the recipient previously was issued a conflicting unrevoked ruling on the identical merchandise; coated fabric.

DEAR MR. QUIROZ:

On November 2, 1995, this office issued you Headquarters Ruling Letter (HRL) 958462 in which Customs classified four styles of plastic coated fabric under subheading 5903.90.2500, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Since the issuance of that ruling, it has come to our attention that you were also the recipient of New York Ruling Letter (NYRL) 891702, dated November 19, 1993, in which Customs classified three of the four coated fabrics at issue in HRL 958462 under subheading 5407.20.0000, HTSUSA. As NYRL 891702 had not been revoked at the time of issuance of HRL 958462, and Customs had since reconsidered the classification of the subject merchandise set forth in NYRL 891702, HRL 958462 should have been issued as a revocation of NYRL 891702 pursuant to the requirements of section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057).

Accordingly, HRL 958462 is partially modified. The classification of the 3.0, 6.5 and 8.0 ounce coated polypropylene fabrics set forth in HRL 958462 is revoked as these fabrics were previously classified in NYRL 891702. Please be advised that the classification of the 5.0 ounce fabric set forth in HRL 958462 remains unmodified inasmuch as this fabric was not previously classified in NYRL 891702. NYRL 891702 will be revoked in conformance with section 625(c)(1), cited above, and the classification of the 3.0, 6.5 and 8.0 ounce fabrics will be set forth therein. The revocation of NYRL 891702 will be referenced HRL 958702.

In accordance with section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 C.F.R. 177.10(c)(1)).

JOHN B. ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF WALL SHELF/TOWEL RACK

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a chrome-plated steel and glass wall shelf/towel rack. Notice of the proposed revocation was published February 14, 1996, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after June 3, 1996.

FOR FURTHER INFORMATION CONTACT; Mary Beth McLoughlin, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On February 14, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 30, Number 7, proposing to revoke New York Ruling Letter (NYRL) 813420 dated August 18, 1995, in which a chrome-plated steel and glass wall shelf/towel rack was held classifiable under subheading 7324.90.00, Harmonized Tariff Schedule of the United States (HTSUS), as sanitary ware and parts thereof; of iron or steel; other. No comments were received in response to the notice.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking NYRL 813420 to reflect the proper classification of the wall shelf under subheading 8302.50.00, HTSUS, as base metal hat racks, hatpegs, brackets and similar fixtures. Headquarters Ruling Letter 958421 revoking NYRL 813420, is set forth as the attachment to this document.

Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

Dated: March 18, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC, March 18, 1996.
CLA RR:TC:MM 958421 MMC
Category: Classification
Tariff No. 8302.50.00

MS. JACQUELINE A. BONACE
BLAIR CORPORATION
220 Hickory Street
Warren, PA 16366–0001

Re: NYRL 813420 revoked; wall shelf/towel rack; ENs 73.24, 83.02; HRL 957427.

DEAR MS. BONACE:

This is in reference to your letter of September 5, 1995, requesting reconsideration of New York Ruling Letter (NYRL) 813420 issued to you by the Area Director of Customs, New York Seaport, on August 18, 1995, concerning the classification of a chrome plated steel and glass wall shelf/towel rack under the Harmonized Tariff Schedule of the United States (HTSUS). A sample of the article was submitted for our examination.

In NYRL 813420, you were advised that item #742501 was classified under subheading 7324.90.00, HTSUS, which provides for sanitary ware and parts thereof, of iron or steel, other. You believe that item #742501 could be considered a towel rack classifiable under subheading 8302.50.00, HTSUS, as hat-racks, hat pegs, brackets and similar fixtures, and parts thereof.

Pursuant to section 625(c)(1) Tariff Act of 1930 [19 U.S.C. 1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057, 2186), notice of the proposed revocation of NYRL 813420 was published, on February 14, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 7. No comments were received in response to the notice.

Facts:

The subject article is constructed of a chrome-plated steel frame which consists of 3 bars each measuring approximately 2' long, 4 wall mounts, a shelf frame used to support a glass shelf, a round movable "towel bar", a ring to support a hair dryer, and a smaller movable towel bar. The frame is constructed in an "H" like shape. The horizontal stationary towel bar is attached to the vertical bars approximately 3½" from the top of the bars and the glass shelf frame approximately 3½" from the bottom. A wall mount is attached to the top and bottom of each of the vertical bars. The other attachments are mounted to the vertical bars.

Issue:

Is item #742501 classifiable as a towel rack under subheading 8302.50.00, HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." The subheadings under consideration are as follows:

7324.90.00	Sanitary ware and parts thereof; of iron or steel: Other, including parts
8302.50.00	Base metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows, blinds, coachwork, saddlery, trunks, chests, caskets or the like; base metal hat racks, hat-pegs, brackets and similar fixtures; castors with mountings of base metal; automatic door closers of base metal; and base metal parts thereof: hat-racks, hat pegs, brackets and similar fixtures, and parts thereof

In an effort to determine if the subject article is provided for under each heading, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be consulted. The ENs, although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23, 1989). En 73.24, pg. 1036–1037, states in pertinent part, that:

> This heading comprises a wide range of iron or steel articles, **not more specifically covered** by other headings of the Nomenclature, used for sanitary purposes.

These articles may be cast, or of iron or steel sheet, plate, hoop, strip, wire, wire grill, wire cloth, etc., and may be manufactured by any process (moulding, forging, punching, stamping, etc.). They may be fitted with lids, handles or other parts or accessories of other materials **provided** that they retain the character of iron or steel articles.

The heading includes, baths, bidets, hip-baths, foot-baths, sinks, wash basins, toilet sets; soap dishes and sponge baskets; douche cans, sanitary pails, urinals, bedpans, chamber-pots, water closet pans and flushing cisterns whether or not equipped with their mechanisms, spittoons, toilet paper holders.

The heading excludes:

(a) Cans, boxes and similar containers of **heading 73.10.**
(b) Small hanging medicine and toilet wall cabinets and other furniture of **Chapter 94.**

EN 83.02, pg. 1118, states in pertinent part, that this heading covers:

(G) hat-racks, hat-pegs, brackets (fixed, hinged or toothed, etc.) and similar fixtures such as coat racks, towel racks, dish-cloth racks, brush racks, key racks.

According to the ENs, the subject article is described by both headings. Inasmuch as the subject article is *prima facie* described in two different headings, it cannot be classified according to GRI 1. When goods cannot be classified by applying GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs are applied.

GRI 3 states, in pertinent part, that when goods are, *prima facie,* classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description.

EN 83.02 clearly indicates that towel racks are described in heading 8302. Alternatively, EN 73.24 merely provides for all "sanitary" articles, which are not more specifically covered by other headings. In Headquarters Ruling Letter 957427 dated December 29, 1994, another wall shelf with towel bars was classified under subheading 8302.50.00, HTSUS.

We are of the opinion that subheading 8302.50.00, HTSUS, provides the most specific description of the wall shelf/towel rack. Therefore, it is classifiable under that subheading.

Holding:

Wall shelf with towel bar, item #742501, is classifiable under subheading 8302.50.00, HTSUS, as base metals hat racks, hat-pegs, bracket and similar fixtures with a column one duty rate of 2% *ad valorem*. NYRL 813420 dated August 18, 1995, is revoked.

In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations [19 CFR 177.10(c)(1)].

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED REVOCATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF ARMORED SUPPLY VEHICLE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of armored supply vehicles. These are amphibious motor vehicles that are plated with armor and designed to transport troops and/or war materiel in fighting areas. Customs invites comments on the correctness of the proposed revocation.

DATE: Comments must be received on or before May 3, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20229. Submitted comments may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th. Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling relating to the tariff classification of an armored supply vehicle. Customs invites comments on the correctness of the proposed revocation.

In *NY* 898914, dated June 27, 1994, certain armored-coated off-road trucks were held to be classifiable as motor vehicles for the transport of goods, in subheading 8704.32.00, Harmonized Tariff Schedule of the United States (HTSUS). This ruling was based on the fact that although they were surplus British army vehicles used to support mobile tank units in the field, their primary function was to carry cargo. *NY* 898914 is set forth as "Attachment A" to this document.

It is now Customs position that notwithstanding the fact the armored supply vehicles are provided for in heading 8704, they are also provided

for in heading 8710 as armored fighting vehicles. Customs intends to revoke *NY* 898914 to reflect the proper classification of these vehicles under heeding 8710.00.00, HTSUS. Before taking this action, we will give consideration to any written comments timely received. Proposed *HQ* 958995 revoking *NY* 898914 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 11, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, June 27, 1994.

CLA–2–87:S:N:N1:101 898914
Category: Classification
Tariff No. 8704.32.0010

MR. DONALD O. MONTGOMERY
ANDERSON SHIPPING COMPANY, INC.
2430 Mall Drive, Suite 295
North Charleston, SC 29418

Re: The tariff classification of amphibious trucks from England.

DEAR MR. MONTGOMERY:

In your letter dated June 2, 1994, on behalf of Garron Fratzer, Brueaux Bridge, LA, you requested a tariff classification ruling. This letter is a supplement to your classification request dated April 27, 1994, and contains additional information. You have submitted photographs of the vehicles.

The imported vehicles are used Alvis Stalwart amphibious (off-road) trucks. These armor coated trucks were made prior to 1968 and are surplus British army vehicles. The trucks are six-wheel drive units (some have incidental additional components such as cranes, hydraulic jacks, winches, radio equipment, and other accessories attached). The vehicles were used by the British army to support mobile tank units in the field. All the trucks have areas for transporting troops, equipment and supplies. The photographs depict the vehicles to have an enclosed cab area (with driver's seat and full instrumentation) and a large cargo bed for carrying merchandise.

The Alvis Stalwart vehicles are powered by an 8-cylinder gasoline type engine, and they are able to travel on paved roads, rugged terrain, and over the open water. The trucks measure approximately 20 feet 6 inches in length, 8 feet 6 inches wide, 7 feet 10 inches high, and have a ground clearance of 1 foot 8 inches. The gross vehicle weight (G.V.W.) is 18,800 pounds and the payload is 11,000 pounds. Maximum speed of the vehicles is 30 miles per hour.

The applicable subheading for the Alvis Stalwart amphibious trucks will be 8704.22.0010. Harmonized Tariff Schedule of the United States (HTS), which provides for motor vehicles for the transport of goods: other, with spark-ignition internal combustion

piston engine: G.V.W. exceeding 5 metric tons but not exceeding 9 metric tons. Motor vehicles classified in subheading 8704.32.0010, HTS, (valued at $1,000 or more) are subject to a duty rate of 25 percent *ad valorem* under subheading 9903.87.00, HTS.

This ruling is being issued under the provisions of section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:TC:MM 958995 JAS
Category: Classification
Tariff No. 8710.00.00

MR. DONALD O. MONTGOMERY
ANDERSON SHIPPING COMPANY, INC.
2430 Mall Drive, Suite 295
North Charleston, SC 29418

Re: *NY* 898914 Revoked; amphibious truck, wheeled motor vehicle for transport of goods, 8704; armored fighting vehicle, supply vehicle for transport of ammunition in fighting areas, Heading 8710.00.00; GRI 3(a).

DEAR MR. MONTGOMERY:

In *NY* 898914, issued to you on June 27, 1994, on behalf of Garron Fratzer, the Area Director of Customs, New York Seaport, replied to your ruling request of April 27, 1994, supplemented on June 2, 1994, and confirmed that the Alvis Stalwart amphibious off-road truck, made in the United Kingdom was classifiable as a motor vehicle for the transport of goods, in subheading 8704.32.00/9903.87.00, Harmonized Tariff Schedule of the United States (HTSUS). We have reconsidered this ruling and believe that it is incorrect.

Facts:

The Alvis Stalwart FV 600 series is a six-wheeled vehicle capable of traversing adverse terrain and inland waters. These vehicles were manufactured prior to 1968, and used in the British Army as armored supply vehicles. The Stalwart measures 21 ft. × 9 ft. × 8 ft. weighs approximately 18,800 lbs. gross vehicle weight (G.V.W.), with a top speed of 38 mph. These vehicles are fully amphibious and propelled in the water by two marine jets driven by a power take-off from the gearbox. These vehicles have a fully enclosed cab with a rear cargo bed open at the top, with drop sides and a drop tailgate. The Stalwart can carry 5000 kg of cargo or up to 38 fully armed troops. They are equipped with ¾ to 1 inch metal plate on its sides, front, rear and underside—the latter for protection against land mines—and ⅜ inch thick glass in all windows. The metal plating is said to be bullet-proof against ammunition of up to 30 caliber (0.3″). The Stalwart has a front-mounted hydraulically operated winch with a 4900 kg capacity. The model FV 623 is fitted with a hydraulic crane for unloading pellets of ammunition to field-based artillery regiments.

The provisions under consideration are as follows:

8704	Motor vehicles for the transport of goods:
	Other, with spark-ignition internal combustion piston engine:
8704.32.00	G.V.W. exceeding 5 metric tons/25 percent under subheading 9903.87.00
8710.00.00	Tanks and other armored fighting vehicles, motorized, whether or not fitted with weapons, and parts of such vehicles * * * Free

Issue:

Whether the Alvis Stalwart is an armored fighting vehicle of heading 8710.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6. Under GRI 3(a), where goods are *prima facie* classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description.

The **Harmonized Commodity Description And Coding System Explanatory Notes (EN's)** constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the **ENs** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENs** should always be consulted. *See* T.D. 89–80. 54 Fed.

Relevant **ENs** at p. 1428 include among the vehicles of heading 8704 self-loading vehicles equipped with winches, elevating devices, etc., but designed essentially for transport purposes. These notes describe the Alvis Stalwart vehicles in issue. Other **ENs** at p 1435 include within the vehicles of heading 8710 armored cars and armored supply vehicles. Armored cars are faster and lighter than tanks and sometimes are only partly armored. They are mainly used for police duties, reconnaissance or for transport in fighting areas. Some armored cars are track-laying but the majority are either half-track or road-wheel type, and they may be amphibious. Armored supply vehicles are generally of the track-laying type, whether or not designed to be armed, and are used for the transport of petrol, ammunition, etc., in fighting areas. Whether used for transporting troops or war materiel, the Alvis Stalwart vehicles are described by the **ENs** to heading 8710.

For purposes of GRI 3(a), a heading which more clearly identifies goods shall be preferred to one where the identification is less complete. In this case, both heading 8704 and heading 8710 encompass motorized vehicles for transporting goods. However, for purposes of heading 8710 the term ***armored fighting vehicles*** vehicles encompasses motorized vehicles that are armored and which transport both persons and goods in fighting areas. We conclude that heading 8710 more clearly identifies the goods than does heading 8704.

Holding:

Under the authority of GRI 3(a), the Alvis Stalwart FV 600 series is classifiable in HTSUS 8710.00.00. *NY* 898914, June 27, 1994, is revoked.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF LEATHER AND COTTON WALLETS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of leather and cotton wallets. Comments are invited on the correctness of the proposed ruling.

EFFECTIVE DATE: Comments must be received on or before May 3, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Nancy Plumer, Textile Branch, (202) 482–7089.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of leather and cotton men's wallets.

In New York Ruling Letter (NYRL) 813767, dated August 29, 1995, Customs classified three styles of men's wallets in subheading 4202.32.4000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Trunks, suitcases, * * *; * * * wallets * * *: Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or of textile materials: With outer surface of textile materials: Of vegetable fibers and not of pile or tufted construction: Of cotton." This ruling letter is set forth in "Attachment A."

The outer surface of the three wallets at issue is comprised of leather and cotton fabric. It is Customs' position that the subject wallets are

properly classified based on General Rule of Interpretation 3(b). After examining the wallets and the factors that govern a GRI 3(b) analysis, this office deems the wallets classifiable based on their leather components in subheading 4202.31.6000, HTSUS, which provides for "Trunks, suitcases, * * *; * * * wallets * * *: Articles of a kind normally carried in the pocket or in the handbag: With outer surface of leather, of composition leather or of patent leather: Other."

Customs intends to revoke NYRL 813767 to reflect proper classification of the wallets in subheading 4202.31.6000, HTSUS. Before taking this action, consideration will be given to any written comment timely received. Proposed Headquarters Ruling Letter 958475, which serves to modify NYRL 813767, is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not he entertained for actions occurring on or after the date of publication of this notice.

Dated: March 6, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, August 29, 1995.

CLA–2–4:S:N:N5:341 813767
Category: Classification
Tariff No. 4202.32.4000

MS. SALLY CAPITO
PEACE INTERNATIONAL CORP.
910 Sivert Drive
Wood Dale, IL 60191

Re: The tariff classification of wallets from China and/or Hong Kong.

DEAR MS. CAPITO:

In your letter dated August 14, 1995, on behalf of Humphreys, Inc., you requested a classification ruling for wallets.

You have submitted three samples with your request, identified as style numbers 95RIZBLU, 95RAMBLK and 95RAIGRN, which are men's wallets composed of leather and 100 percent cotton woven fabric. They are equally of leather and of cotton woven fabric. Therefore, the material which appears last in the tariff applies. The items are of textile material. Your samples are being returned as you requested

The applicable subheading for the wallets of 100 percent cotton woven fabric will be 4202.32.4000, Harmonized Tariff Schedule of the United States (HTS), which provides for articles of a kind normally carried in the pocket or in the handbag; with outer surface of textile materials, of vegetable fibers and not of pile or tufted construction, of cotton. The duty rate will be 7.1 percent *ad valorem*.

Items classifiable under 4202.32.4000 fall within textile category designation 369. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa. Products of Hong Kong are subject to the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:TE 958475 NLP
Category: Classification
Tariff No. 4202.31.6000

MR. KENNETH G. WEIGEL
MS. NANCY KAO
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, DC 20005

Re: Reconsideration of NYRL 813767; wallet made of leather and cotton fabric; heading 4202; GRI 3(b); HRLS 081373 (10/17/88) and 952831 (2/24/93).

DEAR MR. WEIGEL AND MS. KAO:

On August 29, 1995, Customs issued to your client, Humphreys Inc., New York Ruling Letter (NYRL) 813767, which classified a wallet in subheading 4202.32.4000, Harmonized Tariff Schedule of the United States (HTSUS). In a letter to Customs Headquarters, dated September 27, 1995, you requested reconsideration of HRL 813767. On October 31, 1995, representatives from this office met with you to discuss this issue. Subsequently, you provided Customs with a second submission, dated November 3, 1995. Upon review, we are of the opinion that the classification of the wallets in NYRL 813767 was incorrect and this ruling modifies that classification.

Facts:

The merchandise at issue consists of three styles of wallets. The first wallet, #5342, is a tri-fold style and measures approximately 3⅜ inches by 4⅛ inches when closed and approximately 9¼ inches by 4⅛ inches when opened. The outer surface features 2 large panels of leather and one smaller panel of leather. It also has two panels of cotton fabric that are sewn in between the leather panels. According to your submission, the outer surface of the wallet consists of approximately 26 square inches (67%) of leather and 13 square inches (33%) of cotton fabric. Our measurements of the outer surface of the wallet are as follows:

Material	*Total width (inches)*	*Approximate sq. inch.*	*Percent*
leather	6¼	26	67
cotton	3¾	14	33

The weight of the leather material used in the outer surface is approximately 0.06 kg and the weight of the cotton fabric used in the outer surface is 0.02 kg. The value of the outer surface's leather component is approximately 10 times that of the cotton fabric.

The second wallet, style #5343, measures approximately 3⅛ inches by 4 5/16 inches when closed and approximately 6½ inches and 4¼ inches when opened. It features one large rectangular leather panel and one smaller rectangular leather panel. Cotton fabric has been sewn into the gap between these two areas. Based on the measurements you submitted, the outer surface of the wallet is comprised of 17½ square inches (62%) of leather and 10½ square inches (38%) of cotton fabric. Our measurements of the outer surface of the wallet are as follows:

Material	*Total width (inches)*	*Approximate sq. inch.*	*Percent*
leather	3¾	15.9	57
cotton	2½	10	43

The weight of the leather material used in the outer surface is approximately 0.05 kg and the weight of the cotton fabric is 0.01 kg. The value of the outer surface's leather component is 14 times as great as the value of the cotton fabric.

The third wallet, style #5344, measures approximately 3½ inches by 4⅛ inches when closed and approximately 7 inches by 4⅛ inches when opened. The design of the outer surface is the same style as the above wallet. Based on the measurements you submitted, the outer surface of the wallet consists of approximately 18 square inches (62%) of leather and 11 square inches (38%) of cotton fabric. Our measurements of the outer surface of the wallet are as follows:

Material	*Total width (inches)*	*Approximate sq. inch.*	*Percent*
leather	4	16	57
cotton	3	11.25	43

The weight of the leather material used in the outer surface is approximately 0.05 kg and the weight of the cotton fabric is 0.02 kg. The value of the outer surface's leather component is 15 times that of the cotton fabric's value.

NYRL 813767 classified all three styles of wallets in subheading 4202.32.4000, HTSUS, which provides for "Trunks, suitcases, * * *; * * * wallets * * *: Articles of a kind normally carried in the pocket or in the handbag: With outer surface of sheeting of plastic or of textile materials: With outer surface of textile materials: Of vegetable fibers and not of pile or tufted construction: Of cotton."

It is your position that the outer surfaces of the three wallets are composed predominantly of leather and not of textile materials. Therefore, it is the leather that provides the essential character of the outer surface of the wallets and they should be classified in subheading 4202.31.6000, HTSUS, which provides for "Trunks, suitcases, * * *; * * * wallets * * *: Articles of a kind normally carried in the pocket or in the handbag: With outer surface of leather, of composition leather or of patent leather: Other."

We note that the style numbers utilized in this ruling are different from those in NYRL 813767. At the time Humphrey's broker requested the tariff classification ruling that resulted in NYRL 813767, the wallets had only been assigned the following temporary style numbers: 95RAMBLK, 95RIZBLU, and 95RAIGRN. The wallets have now been assigned permanent product code numbers and this ruling letter refers to the wallets by these codes and not by the previously assigned style numbers utilized in NYRL 813767.

Issue:

Are the subject wallets classifiable in subheading 4202.32.4000, HTSUS, based on their cotton components or in subheading 4202.31.6000, HTSUS, based on their leather components?

Law and Analysis:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

Heading 4202, HTSUS, is the provision for trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper.

GRI 3(a) requires that where two or more headings describe the merchandise, the more specific will prevail; or if two or more headings each refer to part only of the materials in the goods, then classification will be by GRI 3(b). GRI 3(b) states that the material or component which imparts the essential character to the goods will determine the classification. The factors which determine essential character of an article will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods. In general, essential character has been construed to mean the attribute which strongly marks or serves to distinguish what an article is; that which is indispensable to the structure or condition of an article. See, Harmonized Commodity Description and Coding System Explanatory Note (VIII) to GRI 3.

The outer surfaces of the wallets at issue here are constructed of two components: leather and cotton. Wallets with an outer surface of leather are provided for under subheading 4202.31.6000, HTSUS, whereas those with an outer surface of textile material are covered in subheading 4202.32.4000, HTSUS. Therefore, as the outer surface of the wallets consists of two materials and the above subheadings refer to part only of the materials of the goods, then classification of the wallets is based on the material that imparts the essential character to the outer surface of the wallets pursuant to GRI 3(b).

Headquarters Ruling Letter (HRL) 081373, dated October 17, 1988, dealt with the classification of, *inter alia*, a woman's wallet and wallet/credit card holders and the issue of what material constituted their outer surface. In deciding this issue HRL 081373 stated that a determination of essential character of the outer surface of luggage and related products cannot be based solely on a physical measurement of the component materials of the outer surface area. However, this ruling observed that such a measurement is of paramount importance in determining the make-up of the exterior surface. This ruling stated that when viewing luggage and related products, the materials of the outer surfaces produce a visual impact which in many instances leaves little or no doubt as to what material gives the outer surfaces their essential character.

In the instant case, the outer surfaces of the wallets at issue are comprised of leather and cotton fabric in the following percentages by weight: style #5342—67% leather and 33% cotton; style #5343—57% leather and 43% cotton and style #5344—57% leather and 43% cotton. However, as stated above, this is not conclusive of classification of the subject wallets. While a visual examination reveals that the leather predominates on style #5342, we do note that on the two bi-fold styles, there appears, based on a visual examination, to be only slightly more leather than cotton. In determining the essential character of the outer surface of certain products of heading 4202, HTSUS, greater weight has been accorded to the visual quality of these products, however, it is not the only factor we focus on. See, HRL 952831, dated February 24, 1993, wherein we classified a handbag based on GRI 3(c) where the visual impact equally conveyed the impression of narrow textile strips of cotton and strips of PVC and the cost, weight and surface coverage was also comparable.

In the instant case, when all the factors as discussed in the EN to GRI 3(b) are taken into consideration, it is the leather that predominates. For example, the leather predominates by weight, bulk, value and it provides durability to these wallets. Therefore, it is the leather that imparts the essential character to the subject wallets. Thus, style #5342, #5343 and #5344 are classified in subheading 4402.31.6000, HTSUS.

In conclusion, we would like to briefly address two points made in your submission. First, it is our position that the cotton portions of these wallets are more than trim. They are considered part of the outer surface area of the wallets and were considered in determining which component provided the essential character to the outer surface of the wallets. Second, although NYRL 813767 did not specifically state this, the determination that the wallets were "equally of leather and cotton" was not based on a physical measurement, but on a visual inspection of the wallets and the role of the constituent materials. Implicit in this ruling was the conclusion that a classification determination could not be made

based on GRI 3(b) and, therefore, classification was based on GRI 3(c). Thus, while we disagree with the ultimate holding in NYRL, 813767, we do not believe that NYRL 813767 "on its face misstates the facts".

Holding:

NYRL 813767 is modified. Wallet styles #5342, #5343 and #5344 are classified in subheading 4202.31.6000, HTSUS, which provides for "Trunks, suitcases, * * *; * * * wallets * * *: Articles of a kind normally carried in the pocket or in the handbag: With outer surface of leather, of composition leather or of patent leather: Other." The rate of duty is 8% *ad valorem*.

In accordance with section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

MODIFICATION OF CUSTOMS RULING RELATING TO COUNTRY OF ORIGIN MARKING OF WIRE ROD

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of country of origin marking letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying a ruling pertaining to country of origin marking of wire rod. Notice of the proposed modification was published January 31, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 4/5.

EFFECTIVE DATE: Merchandise entered, or withdrawn from warehouse, for consumption on or after June 3, 1996.

FOR FURTHER INFORMATION CONTACT: Burton Schlissel, Special Classification and Marking Branch (202) 482–6945.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 31, 1996, Customs published a notice in the CUSTOMS BULLETIN, Volume 3, Number 4/5, proposing to modify Headquarters Ruling Letter (HRL) 558831 issued January 31, 1995, by the Director, Commercial Rulings Division (now Division of Tariff Classification Appeals), U.S. Customs Service Headquarters. The ruling pertained to country of origin marking of wire rod.

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported

into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit, in such a manner as to indicate to the ultimate purchaser in the U.S. the English name of the country of origin of the article. In *United States v. Friedleander & Co.* 27 CCPA 297 at 302, C.A.D. 104 (1940), the court stated that "Congress intended that the ultimate purchaser should he able to know by an inspection of the marking on the imported goods the country of origin of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods are produced, be able to buy or refuse to buy them, if such marking should influence his will."

Part 134, Customs Regulations (Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304. Section 134.33, Customs Regulations, (19 CFR 134.33), known as the "J-list", specifies certain classes of articles which are excepted from individual country of origin marking pursuant to section 304(a)(3)(J), Tariff Act of 1930, as amended (19 U.S.C. 1304(a)(3)(J)). Among the classes of articles enumerated under 19 CFR 134.33 are "Metal bars, except concrete reinforcement bars; billets, blocks, blooms; ingots; pigs; plates; sheets, except galvanized sheets; shafting; slabs; and metal in similar forms."

In Headquarters Ruling Letter (HRL) 558831 dated January 31, 1995, we found that wire rod falls within the class of articles which include "Metal bars, except concrete reinforcement bars * * *" specified on the "J-list." As a result of this finding, we held that the importer of wire rod to be repacked into new containers after leaving Customs custody was required to comply with the certification requirement of section 134.25, Customs Regulations (19 CFR 134.25), which applies to repacked "J-list" articles and articles incapable of being marked. In an earlier ruling, HRL 723721 dated January 17, 1984, we found that while wire (except barbed wire) was a "J-list article", wire rod was specifically and separately defined (under the Tariff Schedules of the United States (TSUS), predecessor to the Harmonized Tariff Schedule of the United States (HTSUS)). Therefore, we held in HRL 732781 that wire rod was not on the "J-list." We note that under the HTSUS, wire rod is classified under headings 7213 through 7215, while wire is separately classified under heading 7217.

Accordingly, after reconsideration of our determination in HRL 558831, we now find that wire rod is not on the "J-list." Therefore, Customs proposed in a document published in the CUSTOMS BULLETIN, Volume 30, Number 4/5, dated January 31, 1996, to modify HRL 558831 to reflect that wire rod is not on the "J-list" (19 CFR 134.33), and that the certification requirements of 19 CFR 134.25 are not applicable to wire rod. We also stated, in that document, that the importer of wire rod which will be repacked is subject to the certification requirements of 19 CFR 134.26.

Two comments were received in response to the notice. One commenter expressed support for Customs position that wire rod is not on the J-list, and for the other findings reflected in the proposed ruling, but believes that it should be clarified to emphasize that the exception to marking under 19 CFR 134.32(d), which permits the marking of containers rather than the individual article, is applicable to wire rod. Otherwise, this commenter believes that there may be some misinterpretation of the ruling by Customs field personnel, since articles on the J-list are also excepted from the individual marking requirements. In addition, this commenter suggests that Customs should affirm its position that the steel banding or strapping which secures wire rod constitutes a container, and that the common trade practice of marking these containers will satisfy the marking requirements.

Customs understands the commenter's concern regarding the marking of wire rod, and has clarified the proposed ruling by providing in the holding that bands or straps which are customarily used in the trade to secure wire rod are considered containers under 19 U.S.C. 1304(a)(3)(D) and 19 CFR 134.32(d), and that marking of these containers will satisfy the exception under 19 CFR 134.32(d) as applied to the imported articles.

The second commenter believes that 19 CFR 134.26 was never intended to be used in this situation where the articles are not individually marked upon entry. Rather, this commenter believes that Customs should use other existing remedies, such as 19 CFR 134.34, which authorizes the district director (now port director) to grant an exception under 19 CFR 134.32(d) for articles intended to be repacked after release from Customs custody under certain conditions. In addition, the commenter points out that the express provisions of 19 CFR 134.25 and 19 CFR 134.26 deal only with the "repacking" of imported articles, and as a result confusion arises when articles are subject to further processing which does not result in a substantial transformation and are then repacked.

While Customs agrees that 19 CFR 134.34 is an existing remedy which may be used to authorize the exception to the marking requirements under 19 CFR 134.32(d), we believe that 19 CFR 134.26 is also applicable to cover unmarked articles such as wire rod in the instant situation. In this regard, as noted in the proposed ruling, we find no language in 19 CFR 134.26 which restricts its requirements only to situations which involve an attempt to conceal or obstruct country of origin information appearing on repacked articles. Moreover, the basic requirement under section 19 U.S.C. 1304(a) is that unless excepted, all articles of foreign origin must be marked to indicate to the "ultimate purchaser" in the U.S. the name of their country of origin. If the U.S. processor does not "substantially transform" an imported article into a new and different having a new name, character or use, the U.S. processor is not the "ultimate purchaser" of that article, and such article must

be marked pursuant to section 1304(a) after such processing in the U.S. until it reaches the "ultimate purchaser" in the U.S.

However, Customs recognizes that the language of 19 CFR 134.26 may be ambiguous and accordingly may have been misinterpreted in the past by the importing community, as well as Customs personnel. In order to clarify this provision as well as other country of origin marking regulations, Customs is undertaking a complete revision of Part 134. The proposed amendments to the regulations will be published at a future date in the Federal Register, and at that time, the trade community will be given the opportunity to comment and offer suggestions with respect to Customs proposals.

The final ruling modifying HRL 558831 is set forth in the Attachment to this document.

Dated: March 12, 1996.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 12, 1996.

CLA–2 RR:TC:SM 559244 BLS
Category: Marking

PORT DIRECTOR
477 Michigan Avenue
Detroit, MI 48226–2568

Re: Internal Advice 19/95; Country of origin marking of wire rod; 19 GRI 134.26; Article 509; modification of HRL 558831.

DEAR SIR:

This is in reference to your memorandum dated May 17, 1995, requesting internal advice (IA 19/95) in connection with country of origin marking requirements of wire rod imported from Canada.

Facts:

Ivaco Rolling Mills ("Ivaco") is a producer of steel wire rod in Canada and is the importer of record for that product. The company sells the rod to unrelated U.S. customers who in turn process the rod into wire for resale. The rod is not individually marked upon importation, but its containers or holders, *i.e.*, steel banding or strapping, are marked with the country of origin. Additional marking duties under 19 U.S.C. 1304 have been assessed for failure to comply with the Certification and notification requirements of section 134.25, Customs Regulations (19 CFR 134.25), in connection with unliquidated entries filed during 1994. Ivaco is currently complying with the certification requirements of 19 CFR 134.25, but seeks clarification of its obligations pertaining to country of origin marking requirements of the imported product, and believes that marking duties in this situation were improperly assessed.

Issues:

1) Whether the U.S. processor or a subsequent purchaser is the "ultimate purchaser" of the imported wire rod.

2) Whether wire rod is on the "J-list", section 134.33 (19 CFR 134.33).

3) Whether the notice and certification requirements of 19 CFR 134.25 are applicable if the imported product is capable of being marked but is not on the "J-list."

4) If wire rod is not on the J-list, whether notices and certifications must be provided by the importer for wire rod pursuant to 19 CFR 134.26 when the product is (a) not entered in bulk containers, and (b) not repacked in retail containers after importation to conceal the country of origin marking.

5) Whether Ivaco, as importer of record, can be liable for marking duties due to its customers' failure to mark and/or notify *their* customers when Ivaco has properly marked and entered the merchandise with the country of origin, and certified to Customs and provided notice to its customers at the time of sale pursuant to section 134.25 or 134.26, Customs Regulations (19 CFR 134.25, 134.26).

6) Whether paragraph 9 of NAFTA (North American Free Trade Agreement) Annex 311 limits the imposition of duties or penalties for failure to comply with country of origin marking requirements in situations in which the importer of record has (a) properly marked and entered the merchandise with the country of origin, but (b) has not certified to Customs and provided notice at the time of sale pursuant to 19 CFR 134.25 or 134.26.

Law and Analysis:

Ultimate Purchaser:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or its container) will permit in such manner as to indicate to the ultimate purchaser the English name of the country of origin of the article. The regulations implementing the requirements and exceptions to 19 U.S.C. 1304 are set forth in Part 134, Customs Regulations (19 CFR 134).

Section 134.1(d), Customs Regulations (19 CFR 134.1(d)), provides that for a good of a NAFTA country, the "ultimate purchase" is generally the last person in the U.S. who purchases the good in the form in which it was imported. If an imported article will be used in manufacture, the manufacturer may be the "ultimate purchaser" if the process results in one of the changes prescribed in the NAFTA Marking Rules as effecting a change in the article's country of origin. If the manufacturing process does not result in one of the changes prescribed in the NAFTA Marking Rules as effecting a change in the article's country of origin, the consumer who purchases the article after processing will be regarded as the ultimate purchaser. Canada is a NAFTA country *(see* 19 CFR 134.1(g)), and, therefore, the NAFTA Marking Rules set forth under Part 102, Interim Customs Regulations (19 CFR Part 102) are applicable. (For purposes of this ruling, we are assuming that the country of origin of the wire rod is Canada.)

Section 102.11 of the interim regulations sets forth the required hierarchy for determining country of origin for marking purposes. Section 102.11(a) of the interim regulations provides that "[t]he country of origin of a good is the country in which:

(1) the good is wholly obtained or produced;

(2) the good is produced exclusively from domestic materials; or

(3) Each foreign material incorporated in that good undergoes an applicable change in tariff classification set out in section 102.20 and satisfies any other applicable requirements of that section, and all other requirements of these rules are satisfied."

Since the wire is produced in the U.S. from Canadian wire rod, the wire is neither wholly obtained or produced nor is it produced exclusively from domestic materials. Therefore, paragraphs (a)(1) and (a)(2) of section 102.11 cannot be used to determine the country of origin of the finished article. Thus, paragraph (a)(3) of section 102.11 is the applicable rule that we must first apply to determine the origin of the product.

We find that the imported rod will be classified under headings 7213–7215. The wire products resulting from the U.S. processing of the wire rod are classified under heading 7217. The specific tariff rule set out in section 102.20(a), Section XV, Chapters 72 through 83, 7217 of the interim regulations, provides:

7217	A change to heading 7217 from any other heading, except from 7213 through 7215.

Under this rule, the imported rod does not undergo the applicable change in tariff classification set out in section 102.11(a). Therefore, under the hierarchical rules, we must apply the next applicable rule, section 102.11(b), to determine the country of origin of the wire.

Section 102.11(b) of the interim regulations provides, in pertinent part, that where the country of origin cannot be determined under paragraph (a), the country of origin of the good is the country or countries of origin of the single material that imparts the essential character of the good. Section 102.18(b)(2) provides that for purposes of section 102.11(b), "only domestic and foreign materials * * * that are classified in a tariff provision from which a change in tariff classification is not allowed in the [102.20] rule for the good * * * shall be taken into consideration in determining the parts or materials that determine the essential character of the good." In the instant case, only the Canadian wire rod is classified under a provision from which a change in tariff classification is not allowed under the 102.20 rule for the wire.

Therefore, we find that the material that imparts the essential character to the wire is the wire rod. Accordingly, since under the NAFTA Marking Rules the processing of the wire rod does not effect a change in its country of origin; a person who purchases the article after such processing will be regarded as the ultimate purchaser. *(See* also Headquarters Ruling Letter 558831 dated January 31, 1995.)

J-list—19 CFR 134.25:

The importer of articles which are intended to be repacked for sale to an ultimate purchaser is subject to the certification and notification requirements of 19 CFR 134.25, if the articles are on the "J-list", or are incapable of being marked. *See* 19 CFR 134.32 and 19 CFR 134.33. While excepted from individual marking requirements, the containers or holders of these articles are required to be marked. The importer of articles intended to be repacked in retail containers not subject to the requirements of 19 CFR 134.25 is subject to the certification and notification requirements of 19 CFR 134.26. In either case, the importer must certify to the district director that if the articles are intended to be sold or transferred to a subsequent purchaser or repacker, the importer will notify such person of the marking requirements. These rules (19 CFR 134.25 and 134.26) are intended to ensure that the ultimate purchaser will be advised of the country of origin, and apply to repacked articles unless the importer is considered to he the ultimate purchaser, in which case the rules do not apply.

Since in the instant case the ultimate purchaser is a person who purchases the imported product alter it is processed into wire, the importer of the repacked articles must comply with the requirements of 19 CFR 134.25 or 19 CFR 134.26, depending upon whether the wire rod is on the J-list. That is the issue which we now address.

In HRL 558831, we held that wire rod was on the J-list, and that the importer was subject to the requirements 19 CFR 134.25. However, in an earlier ruling, HRL 723781 dated January 17, 1984, we noted that while "Wire (except barbed wire)" was a J-list article, wire rod was specially and separately defined (under the Tariff Schedules of the United States (TSUS), predecessor to the Harmonized Tariff Schedule of the United States, (HTSUS)). Therefore, we held in HRL, 732781 that wire rod was not on the J-list. We note that under the HTSUS, wire rod is classified under headings 7213 through 7215, while wire is separately classified under heading 7217. Accordingly, after reconsideration of our determination in HRL 558831, we now hold that wire rod is not on the J-list.

Since wire rod is capable of being marked, we find that the importer is not subject to the requirements of 19 CFR 134.25, inasmuch as that provision applies only to J-list articles or to articles incapable of being marked. HRL 558831 is hereby modified to the extent the ruling holds that wire rod is on the J-list, and that 19 CFR 134.25 is applicable to the repacked articles.

Applicability of 19 CFR 134.26:

Section 134.26 of the Customs Regulations (19 CFR 134.26), which applies to articles that are repacked or manipulated after importation, provides the following:

> (a) *Certification requirements.* If an article subject to these requirements is intended to be repacked in retail containers (e.g., blister packs) after its release from Customs custody, or if the district director having custody of the article, has reason to believe such article will be repacked after its release, the importer shall certify to the district director that: (1) if the importer does the repacking, he shall not obscure or conceal the country of origin, marked to indicate the country of origin of the article, or else the new container shall be marked to indicate the country of origin of the article in accordance with the requirements of this part; or (2) if the article is intended to be sold or transferred to a subsequent purchaser or repacker, the importer shall notify such purchaser

or transferee, in writing, at the time of sale or transfer, that any repacking of the article must conform to these requirements.

Ivaco contends that 19 CFR 134.26 is not applicable to the importation of wire rod, for the reason that this provision applies only to articles that are individually marked, entered in bulk containers, and then repacked in retail containers after importation to conceal the country of origin marking. Thus, Ivaco states that the imported product in this case is not individually marked nor imported in "bulk", and that the repacking does not obscure or control the country of origin; since only the steel bands or strapping are marked. Further, the importer points out that its customer does not repack the processed wire for retail sale. Ivaco also notes that in C.S.D. 92–25 (Cust. Bull., Vol. 26, 1992), we stated that 19 CFR 134.26 "does not apply to articles imported in bulk, not individually marked, which are to be repackaged after importation for retail sale to ultimate purchasers, *unless they are otherwise excepted from country of origin marking.*" Ivaco points out that wire rod is not individually marked with the country of origin, and that only its container, i.e., strapping or banding, is so marked. Upon receipt of the rod, the U.S. processor by necessity merely removes the tag identifying the product as wire rod, and does not by its processing obscure or conceal any country of origin marking. Ivaco also argues that the processed wire is not packaged by its customer in "retail" containers, but instead is wound on large spools that are sold to companies that further fabricate the wire.

We disagree with Ivaco's contentions and find that 19 CFR 134.26 is applicable in the instant case. Thus, we have previously held that articles not individually marked upon importation were subject to the requirements of 19 CFR 134.26. *(See* HRL 734733 dated November 25, 1992, where we found that the importer of frames and parts of safety glasses that were marked with their country of origin on printed stickers affixed to plastic bags was subject to the requirements of 19 CFR 134.26, if the articles were repacked or manipulated.) Further, we find no language in the regulation or other authorities restricting its requirements to articles imported in "bulk", even if we were to find that the wire rod was not imported in this manner. Similarly, while we agree that the regulation was intended in part to minimize the practice of concealing or obscuring country of origin information appearing on repacked articles, we find no language in the regulation which restricts its requirements to that situation only. It is clear that 19 CFR 134.26 also covers situations where the containers and not the articles are marked (as an exception to the marking requirements) and the articles will be repacked. In addition it is our opinion that the reference to repacking of the article in retail containers refers to the final repacking, which may or may not be performed by the first repacker, and that the importer's obligations under 19 CFR 134.26 apply to the repacker of the articles, whether or not that person is the repacker of the articles for retail sale.

Finally, we find that C.S.D. 92–25 does not provide support for the importer's argument. The statement in C.S.D. 92–25 was made in the context of an importer of unmarked or improperly marked goods attempting to secure their release by executing a certification under 19 CFR 134.26. We stated that the provision was not applicable in such case, unless the goods were otherwise excepted from country of origin marking. Since under 19 CFR 134.32(d) an exception is provided to the marking requirements if the containers of the imported articles will reasonably indicate their country of origin, as in the subject case, the quoted statement in C.S.D. 92–25 is not applicable to the present situation. We further note that the importer's interpretation of 19 CFR 134.26 would compromise the intent of 19 U.S.C. 1304, and the underlying regulations, i.e., to ensure that the ultimate purchaser is advised of the country of origin of the imported article. An importer is responsible under 19 U.S.C. 1304 to ensure that the article of foreign origin (or its container) remains marked as to its origin when it reaches the ultimate purchaser in the U.S. Sections 134.25 and 134.26 provide a mechanism for an importer to comply with this statutory requirement within the practical limitations of the trading environment.

Under the circumstances, we find that Ivaco is subject to the requirements of 19 CFR 134.26. Therefore, if Ivaco complies with the requirements of 19 CFR 134.26 in connection with subsequent entries, it will not be liable for marking duties because of a subsequent repacker's failure to properly mark the articles. Similarly, an importer who is subject to and complies with the requirements of 19 CFR 134.25 will not be liable for marking duties as a result of a subsequent repacker's failure to properly mark the articles.

Marking Duties Under NAFTA:

Paragraph 9 of NAFTA Annex 311 generally provides that, except for repeated violations of the marking requirements as set forth in paragraph 8, no special duty or penalty shall be

imposed for failure to comply with the country of origin marking requirements of a party, unless the good is removed from Customs custody or control without being properly marked, or a deceptive marking has been used. (The importer contends that since in this case the wire rod was properly marked when released from Customs custody, and the marking was not deceptive, pursuant to this provision marking duties cannot be assessed.)

In this case, the wire rod was not individually marked upon importation into the U.S. Although the articles could have been excepted from marking under 19 CFR 134.32(d), for the reason that the marking of the containers would reasonably indicate the origin of the articles, in the case of imported articles such as the wire rod which are to be repacked this exception is authorized only if the port director is satisfied that:

(1) The containers in which the articles are repacked will indicate the origin of the articles to an ultimate purchaser in the U.S.; and

(2) The importer arranges for supervision of the marking of the containers by Customs officers at the importer's expense or secures such verification as may be necessary by certification and the submission of a sample or otherwise of the marking prior to liquidation of the entry. 19 CFR 134.34.

In this case, since the foregoing conditions for receiving the exception under 19 CFR 134.32(d) were not met, the wire rod (or its container) was not considered properly marked when released from Customs custody. Therefore, paragraph 9 of Annex 311 of the NAFTA cannot be used to limit the imposition of marking duties in this case for failure to comply with the requirements of 19 CFR 134.26.

Holding:

1) Under the NAFTA Marking Rules, the processing of the Canadian wire rod in the U.S. into wire does not effect a change in its country of origin. Therefore, a person who purchases the article after such processing will be regarded as the ultimate purchaser of the imported product.

2) Wire rod is not on the "J-list", 19 CFR 134.33, and it is capable of being marked. Therefore, the importer is not subject to the certification requirements of 19 CFR 134.25, which applies only to J-list articles, and articles incapable of being marked. HRL 558831 is modified to the extent it held that wire rod is on the J-list.

3) Metal bands or straps used to secure wire rod are considered containers for purposes of 19 U.S.C. 1304(a)(3)(D) and 19 CFR 134.32(d). Since marking of the containers will reasonably indicate the origin of the wire rod, the exception to the individual marking requirements under 19 CFR 134.32(d) is applicable.

4) The importer is subject to the certification and notification requirements of 19 CFR 134.26, inasmuch as the imported product is intended to be sold to a subsequent purchaser or repacker.

5) Marking duties cannot be assessed against the importer due to its customer's failure to properly mark repacked merchandise with the country of origin, if the imported articles are properly marked upon entry, and the importer complies with the certification and notification requirements of 19 CFR 134.26.

6) Since the importer failed to comply with the conditions pertaining to repacked articles for receiving the exception to the marking requirements under 19 CFR 134.32(d) (allowing marking of the containers only), the wire rod was not properly marked when released from Customs custody, and paragraph 9 of NAFTA Aunex 311 cannot be used to limit the imposition of marking duties, assessed for future to comply with the requirements of 19 CFR 134.26.

This decision should be mailed by your office to the person requesting internal advice no later than 60 days from the date of this letter. On that date the Office of Regulations and Rulings will take steps to make the decision available to Customs personnel via the Customs Ruling Module in ACS and the public via the Diskette Subscription Service, Freedom of Information Act and other public access channels 60 days from the date of this decision.

SANDRA L. GETHERS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

NOTE: This is to advise that Slip Op. 96–51 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the CUSTOMS BULLETIN when available.

(Slip Op. 96–51)

ARISTECH CHEMICAL CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–01–00032

(Dated March 11, 1996)

NOTE: This is to advise that Slip Op. 96–52 is not available for publication at this time due to the confidential nature of the document. A public version of the document will be released and published in the CUSTOMS BULLETIN when available.

(Slip Op. 96–52)

RAELAYNE A. PAULING, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–07–00415

(Dated March 11, 1996)

(Slip Op. 96–53)

NSK LTD. AND NSK CORP., PLAINTIFFS *v.*
UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR

Consolidated Court No. 93–12–00830

Plaintiffs, NSK Ltd. and NSK Corporation (collectively "NSK"), move pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record alleging that the Department of Commerce, International Trade Administration ("Commerce" or "ITA"), erred in (1) refusing to apply a ten percent cap as part of the sum of the deviations methodology; (2) using partial best information available to compute NSK's cost of production; (3) refusing to adjust foreign market value for home market commissions, rebates and discounts; and (4) committing a clerical error.

Held: The Court grants plaintiffs' motion for judgment upon the agency record to the extent that this case is remanded to Commerce to correct the clerical error concerning the identification of unique home market parts. Commerce's final results, to the extent challenged herein, are sustained in all other respects.

[Plaintiffs' motion granted in part; case remanded to Commerce.]

(Dated March 13, 1996)

Lipstein, Jaffe & Lawson, L.L.P. (Robert A. Lipstein, Matthew P. Jaffe and *Grace W. Lawson)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Michael S. Kane);* of counsel: *Linda S. Chang,* Attorney-Advisor, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr., William A. Fennell, Patrick J. McDonough and *Olufemi A. Areola)* for defendant-intervenor.

OPINION

TSOUCALAS, *Judge:* Plaintiffs, NSK Ltd. and NSK Corporation (collectively "NSK"), commenced this action challenging certain aspects of the Department of Commerce, International Trade Administration's ("Commerce" or "ITA") final results of administrative review entitled *Final Results of Antidumping Duty Administrative Reviews; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan ("Final Results"),* 58 Fed. Reg. 64,720 (1993).

BACKGROUND

On November 27, 1992, Commerce initiated administrative reviews of tapered roller bearings ("TRBs") from Japan covering the period of 1991 to 1992. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 57 Fed. Reg. 56,318 (1992). Commerce published the preliminary results of these reviews on September 30, 1993. *See Preliminary Results of Antidumping Duty Administrative Reviews; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan,* 58 Fed. Reg. 51,058 (1993).

On December 9, 1993, Commerce published its final determinations concerning the review at issue. *See Final Results,* 58 Fed. Reg. at 64,720.

NSK now moves pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record alleging the following actions by Commerce were unsupported by substantial evidence on the agency record and not in accordance with law: (1) refusing to apply a ten percent cap as part of the sum of the deviations methodology; (2) using partial best information available ("BIA") to compute NSK's cost of production; (3) refusing to adjust foreign market value ("FMV") for home market commissions, rebates and discounts; and (4) committing a clerical error.[1] Pls.' Mem. Supp. Mot. J. Agency R. at 10–34.

DISCUSSION

The Court's jurisdiction in this action is derived from 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on the grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

1. *Model Match Methodology:*

NSK argues that for purposes of calculating dumping margins, Commerce compared dissimilar merchandise because it did not impose a ten percent limit upon individual bearing deviations as part of its five-criteria model match methodology for selecting the most similar home market TRB model. NSK asserts that the antidumping law mandates that Commerce identify the most similar matches. According to NSK, the absence of a ten percent cap allows for matches between products which are not commercially similar. Pls.' Mem. Supp. Mot. J. Agency R. at 10–14.

Commerce responds that when identical merchandise is not available in the home market for comparison with the merchandise sold to the United States, Commerce must select the "most similar" merchandise based upon the physical characteristics of the merchandise being compared. Def.'s Opp'n to Pls.' Mot. J. Agency R. at 11–12; 19 U.S.C. § 1677(16) (1988).[2] In this review, Commerce compared home market

[1] Plaintiffs abandoned two counts contained in the original complaint. Pls.' Reply to Def.'s Opp'n to Pls.' Mot. J. Agency R. at 20.

[2] 19 U.S.C. § 1677(16) (1988) provides:

The term "such or similar merchandise" means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:

(A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

Continued

sales of TRBs to U.S. sales by devising a "sum of the deviations" methodology. Under this approach, Commerce uses five physical characteristics (inner diameter, outer diameter, width, Y factor, and load rating) as criteria for selecting "similar" model matches. Commerce explains that in conjunction with the "sum of the deviations" methodology, it applied a twenty percent cost cap that prevents the matching of United States and home market models whose variable cost of manufacturing differs by more than twenty percent. Commerce argues its actions are within its discretion and in accordance with law. Def.'s Opp'n to Pls.' Mot. J. Agency R. at 11–15.

The Court of Appeals for the Federal Circuit ("CAFC") recently ruled on this issue in *Koyo Seiko Co. v. United States,* 66 F.3d 1204 (Fed. Cir. 1995), holding that Commerce's model match methodology, without the ten percent cap, is a permissible approach under 19 U.S.C. § 1677(16). In reaching its conclusion, the CAFC noted that under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–43 (1984), where a statute is silent or ambiguous with respect to a specific issue, the court is limited to determining whether the agency's approach is a permissible construction of the statute. *Koyo,* 66 F.3d at 1209. The CAFC upheld Commerce's construction of the statute stating the following:

> Commerce's interpretation is reasonable because there is no evidence that any one of the five criteria should be decisive in determining whether to match a given U.S. TRB with a home-market TRB. By choosing not to apply the ten percent cap, Commerce in essence weighs each of the five criteria equally, which is plainly reasonable.

Koyo, 66 F.3d at 1210.

In light of the decision of the CAFC in *Koyo,* the Court finds that Commerce's model match methodology without the ten percent cap is a reasonable approach and consistent with law.

2. *Use of Partial Best Information Available to Compute Cost of Production:*

In the Final Results, Commerce explained its decision to use partial BIA to calculate NSK's cost of production in the following manner:

> First, at verification the Department discovered that NSK maintains standard costs and corresponding variances for the subject merchandise. Even though in our cost questionnaire we specifically requested NSK to describe its cost accounting system(s), NSK never disclosed or described its standard cost system. Second the

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(B) Merchandise—
(i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,
(ii) like that merchandise in component material or materials and in the purposes for which used, and
(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise—
(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,
(ii) like that merchandise in the purposes for which used, and
(iii) which the administering authority determines may reasonably be compared with that merchandise.

> company failed to adequately demonstrate that the "burden" methodology it uses captures the entire variance (i.e., the untranslated variance account) and that it has captured all production costs in its reported costs of manufacturing. For the models we tested, NSK's reported costs in the submission differ significantly from its standard costs plus variances which NSK maintains in its normal course of business. Therefore, for purposes of these final results, we have retained the adjustments we used in the preliminary results, and, as BIA, have adjusted NSK's submitted costs to reflect standard costs plus variances for the models we tested. For the models we did not test, we increased as BIA, NSK's submitted costs by the highest percentage difference between reported costs and standard cost plus variance.

58 Fed. Reg. at 64,727.

NSK contends that Commerce erred in resorting to use of partial BIA as opposed to relying on the cost of production and constructed value data reported by NSK. NSK argues that Commerce erroneously concluded that NSK's actual cost system did not accurately represent cost of production. According to NSK, Commerce's calculations are flawed because Commerce used NSK's company-wide variance which includes variances related to non-scope products. NSK explains that only two of the nine factories included in calculating the company-wide variance produce scope merchandise. NSK also emphasizes that Commerce's methodology resulted in the comparison of non-period of review values to actual costs incurred during the period of review. Pls.' Mem. Supp. Mot. J. Agency R. at 16–22.

NSK further points out that Commerce verified the accuracy of NSK's actual costs finding only one discrepancy concerning NSK's material cost calculation. NSK claims that this alleged discrepancy was in fact accounted for in its cost calculation. *Id.* at 23–26. In addition, NSK maintains that Commerce accepted NSK's actual cost system in past reviews. *Id.* at 27–28.

In the alternative, NSK submits that if the Court upholds Commerce's resort to partial BIA, the Court should instruct Commerce to use variances based only on scope products manufactured during the period of review. *Id.* at 28–29.

In rebuttal, Commerce asserts that it discovered deficiencies in NSK's submission concerning actual costs and, therefore, recalculated NSK's costs of production. According to Commerce, NSK did not explain why the costs of production reported in the questionnaire differed from the costs of production calculated using the information reported in NSK's accounting records. Def.'s Opp'n to Pls.' Mot. J. Agency R. at 17–18. Commerce contends that NSK's failure both to disclose records of variance costs contained in its accounting system, and to explain the discrepancy between the accounting records and the questionnaire, justified using BIA. *Id.* at 19–21.

Commerce also defends its use of a company-wide variance as consistent with the policy that BIA is a rule of adverse inference. Commerce

argues that using the costs contained in NSK's submission would reward NSK for failing to comply with Commerce's requests for information. *Id.* at 22–23.

Defendant-intervenor, The Timken Company ("Timken"), supports Commerce's decision to rely on partial BIA because of NSK's failure to provide information requested by Commerce concerning NSK's standard cost system until the last day of verification. Def.-Int.'s Opp'n to Pls.' Mot. J. Agency R. at 10–12. Timken also agrees with Commerce's use of a company-wide variance because Commerce did not have sufficient time to verify the group variances identified by NSK on the last day of verification. *Id.* at 13.

Section 1677e(c) of Title 19, United States Code, states that Commerce "shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available." In addition, Commerce's regulations instruct the Secretary to use BIA whenever Commerce:

> (1) Does not receive a complete, accurate, and timely response to the Secretary's request for factual information; or
>
> (2) Is unable to verify, within the time specified, the accuracy and completeness of the factual information submitted.

19 C.F.R. § 353.37(a) (1993).

NSK's position that Commerce should not have resorted to use of BIA is inconsistent with the purpose of BIA as "an investigative tool" which Commerce "may wield as an informal club over recalcitrant parties or persons whose failure to cooperate may work against their best interest." *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990) (quoting *Atlantic Sugar Ltd. v. United States,* 744 F.2d 1556, 1560 (Fed. Cir. 1984)). The record reveals that NSK failed to provide Commerce with all of the requested information. The fact that Commerce may have only found one discrepancy in NSK's actual cost system does not support the argument that Commerce should have relied on the actual cost system. Commerce specifically requested in the cost questionnaire that respondents describe all cost accounting systems used for the bearings under review.[3] In response, NSK reported its actual cost system and did not make any reference to its budgeted cost system

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[3] The questionnaire asked for the following information concerning cost accounting:

> Describe the cost accounting system used by your company for the bearings under review. If you have more than one accounting system, do this for each factory, as necessary. Your description should be provided as a narrative, with flow charts included as appropriate. The description should include, but not be limited to, discussions of the following items:
>
> 1. A general description of the company's cost accounting method (*e.g.*, job order, process, actual, or standard costing);
> 2. If applicable, a description of the company's use of standard costs, including:
>
> a. variances of actual costs from standard, and the period for which the variances are calculated and recorded;
>
> b. the method of distribution of the variances and the basis of each distribution. Note any differences between the cost accounting and financial accounting treatment of these variances;
>
> c. the methods used to develop the standards;
>
> d. the frequency of revisions of the standard costs and the date of the last revision; and
>
> e. how the standard cost system is used for the financial accounting system;
>
> All variances during the period of review must be allocated for the submission. Any significant or unusual cost variances during the period of review should be explained.

Antidumping Request for Information, Section VI at 4.

maintained for individual bearings. *See Corrections to Cost Verification Report,* C.R. Document No. 126, Fiche 300, Frame 9.[4] Even if NSK genuinely believed that the budgeted cost system should not have been reported in response to the questionnaire, NSK should have presented the information in response to Commerce's request during verification for documentation concerning the amount at which pre-selected bearings were valued for inventory purposes during the period of review. *See Verification Report on the Cost of Production and Constructed Value of NSK Ltd. and NSK Corporation ("Verification Report"),* C.R. Document No. 107, Fiche 292, Frame 32. Instead, NSK stated that its inventory records do not include the values of individual bearings. *Id.* NSK does not offer a satisfactory explanation for its decision to wait until the last day of verification to submit records of variance costs that allow it to convert standard costs to actual costs for specific product types.[5] *See Verification Report,* C.R. Document No. 107, Fiche 292, Frames 32–33. NSK's assertion that the information it submitted to Commerce provided a sufficient representation of NSK's cost of manufacturing misses the point that "[i]t is Commerce, not the respondent, that determines what information is to be provided for an administrative review." *Ansaldo Componenti, S.p.A. v. United States,* 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986). NSK's failure to submit all of the information requested in a timely manner justified Commerce's resort to partial BIA.

The next issue is whether Commerce's selection of BIA was proper. Because the relevant statute does not explicitly state what type of information constitutes "best" information, Congress "explicitly left a gap for the agency to fill." *Allied-Signal Aerospace Co. v. United States,* 996 F.2d 1185, 1191 (Fed. Cir. 1993) (quoting *Chevron,* 467 U.S. at 843–44). Accordingly, Commerce's determination as to what constitutes the best information available must be accorded considerable deference. *Allied-Signal,* 996 F.2d at 1191. It is also important to note that the information used by Commerce does not actually have to be the "best" information. In *N.A.R., S.p.A. v. United States,* 14 CIT 409, 416, 741 F. Supp. 936, 942 (1990), the Court stated that "[w]hen use of best information is challenged, the question is not whether the ITA has chosen the 'best' of all available information, but rather whether the information chosen by the ITA is supported by substantial evidence on the record" (citing *Chinsung Indus. Co. v. United States,* 13 CIT 103, 106–07, 705 F. Supp. 598, 601 (1989)). The Court further noted that

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[4] The public record of this administrative review is designated "P.R." and the confidential record is designated "C.R."

[5] The Court also finds NSK's assertion that the budgeted cost system is not really a standard cost accounting system unpersuasive. *See* Pls.' Reply Mem. Supp. Mot. J. Agency R. at 11–14. This argument is inconsistent with NSK's own acknowledgment in the *Corrections to Cost Verification Report* that it has "considered using this system to respond to the cost section of the questionnaire." C.R. Document No. 126, Fiche 300, Frame 9. NSK's basic reason for deciding against this approach is that "the BC [budgeted cost] system is a cumbersome approach for providing responses to the Department's questionnaire." C.R. Document No. 126, Fiche 300, Frame 10. NSK provides some explanation as to why this system is burdensome to report which the Court will not quote due to the proprietary nature of the information, but the Court remains unconvinced that the budgeted cost system does not represent a standard cost system. If the budgeted cost system does not in some manner represent a standard cost system, there would be no reason for NSK to consider using this system to respond to the cost section of Commerce's questionnaire.

"best information available 'is not necessarily accurate information, it is information which becomes usable because a respondent has failed to provide accurate information.'" *N.A.R.*, 14 CIT at 416, 741 F. Supp. at 942 (quoting *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 13, 28, 704 F. Supp. 1114, 1126 (1989), *aff'd*, 901 F.2d 1089 (Fed. Cir.), *cert. denied*, 498 U.S. 848 (1990)).

Commerce is permitted to use adverse partial BIA in cases where the respondent has not substantially complied with information requests. Neutral BIA is "applied only to a respondent who has substantially complied and there is also an inadvertent or unavoidable gap in the record, or when a minor or insignificant adjustment is involved." *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 18 CIT ____, ____, 865 F. Supp. 857, 866 (1994). NSK's failure to report its budgeted cost system is not substantial compliance and the adjustments required are more than minimal. In *Ad-Hoc*, however, the Court remanded the issue of whether Commerce selected BIA which resulted in "needlessly distortive" margins where the plaintiff demonstrated that Commerce's selection of BIA resulted in a margin of over 1000%. In contrast, NSK fails to present any evidence that the use of a company-wide variance or non-period of review data resulted in needlessly distortive margins. As such, the Court finds that Commerce's selection of BIA is supported by substantial evidence on the agency record.

3. *Treatment of Home Market Commissions, Rebates and Discounts:*

In the Final Results, Commerce disallowed certain adjustments to FMV for home market commissions, rebates and discounts. 58 Fed. Reg. at 64,723. Specifically, Commerce addressed NSK's claimed adjustments as follows:

> (1) Discounts, rebates and certain commissions. At verification the Department discovered that actual amounts for total sales to two distributors differed from the amounts used in worksheets for the response. Since the Department verified the corrected amounts and the discrepancies were "small", NSK argues that, although company officials were unable to explain the source of the error, the Department should either accept the corrected data or ignore the *de minimus* errors. * * *
>
> (2) Commissions for delivery on behalf of NSK. NSK argues that since the Department verified the corrected commission amounts, and since most of the errors were unfavorable to NSK, the Department should either accept NSK's corrected information or make no adjustment to the data.
>
> * * * * * * *
>
> (4) Commissions for repurchase for urgent delivery. NSK objects to the Department's denial of this adjustment for commissions because NSK incurred the expense in question and because the Department verified the amount of commissions paid. Moreover, NSK asserts that the Department has accepted the method of allocation in previous reviews. * * *

* * * * * * *

Department's Position: As for (1), NSK officials were unable to explain the source of the error, which affected a substantial percentage of its distributors. Therefore, we have disallowed all adjustments which were based on total sales to the distributors associated with the errors. As for (2), we disagree with NSK. The amounts of commissions paid to distributors in the home market were both understated and overstated, compromising the integrity of the response. Although NSK submitted corrected information, because NSK officials could not explain why the response was inaccurate, we have disallowed these claimed adjustments. * * * As for (4), while we recognize that the expenses were in fact incurred, we do not accept NSK's allocation methodology. NSK allocated commission amounts over sales of the related distributors, who bore no expense in the consummation of the new sales, rather than over the sales to the ultimate customer. To associate the expenses with sales to the distributors is distortive, since NSK did not incur the expenses in connection with these sales.

Id.

NSK concedes that it submitted erroneous information concerning rebates, discounts and commissions paid to two unrelated customers but argues that Commerce should not have disallowed the adjustment to FMV. According to NSK, it submitted the correct information at verification and the necessary changes were *de minimus*. Pls.' Mem. Supp. Mot. J. Agency R. at 32. Similarly, NSK contends that Commerce should have adjusted FMV for commissions for delivery on behalf of NSK because, even though NSK did not accurately report the commissions, it corrected its mistakes at verification. *Id.* at 32–33. Finally, NSK submits that Commerce should have allowed an adjustment to FMV for NSK's repurchase for urgent delivery commissions which, according to NSK, were reasonably reported and allocated. *Id.* at 33–34.

In response, Commerce claims that the discrepancies found in NSK's questionnaire response were more than *de minimus*. Commerce contends that it may not have denied the adjustment to FMV for the commissions, rebates and discounts paid to the two unrelated distributors had NSK been able to explain why the reporting discrepancies occurred. Def.'s Opp'n to Pls.' Mot. J. Agency R. at 26–27. Commerce also maintains that NSK's erroneous reporting of its delivery commissions undermined the integrity of NSK's response since NSK was unable to explain the lack of correspondence between the reported information and NSK's records. *Id.* at 25–26. Finally, Commerce submits that while it verified NSK's urgent delivery commissions, it discovered that the commissions were "allocated across the sales of related distributors who bore no expense with respect to the consummation of the new sales." *Id.* at 24–25.

This Court has acknowledged that "[r]espondents have the burden of creating an adequate record to assist Commerce's determinations." *Nachi-Fujikoshi Corp. v. United States*, 19 CIT ____, ____, 890 F. Supp. 1106, 1111 (1995) (citing *Tianjin Mach. Import and Export Co. v. United*

States, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992)). The Court further noted in *Nachi* that Commerce has been given broad discretion in making adjustments. 19 CIT at ___, 890 F. Supp. at 1111 (citing *Smith-Corona Group Consumer Prods. Div., SCM Corp. v. United States,* 713 F.2d 1568, 1577 n.26 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984)). In *Nachi,* the Court upheld Commerce's decision not to adjust FMV for a certain rebate because the claim was unsubstantiated. In the case at bar, NSK admits that it provided incorrect information in its questionnaire response concerning delivery commissions on behalf of NSK, and rebates, discounts and commissions paid to two distributors. Although NSK corrected this information at verification, it did not provide any reasons for the mistakes contained in its response to Commerce's request for information. *See Post Verification Submission of NSK Ltd. and NSK Corporation,* P.R. Document No. 221, Fiche 135, Frames 5–7. An explanation concerning the source of the error would have allowed Commerce to determine whether, in general, the information submitted by NSK was accurate and reliable. In light of these unexplained errors, Commerce acted reasonably in denying any adjustment to FMV.

Commerce also acted reasonably in rejecting NSK's urgent delivery commissions once it determined that the commissions were not directly related to the sales at issue. Commerce's regulations provide the following guidelines concerning adjustments to FMV:

> (a) *In general.* (1) In calculating foreign market value, the Secretary will make a reasonable allowance for a *bona fide* difference in the circumstances of the sales compared if the Secretary is satisfied that the amount of any price differential is wholly or partly due to such difference. *In general, the Secretary will limit allowances to those circumstances which bear a direct relationship to the sales compared.*

19 C.F.R. § 353.56 (1993) (emphasis added). It is well-established that the respondent bears the burden of showing the existence of a direct relationship between the commissions paid and the sales under consideration. *NSK Ltd. v. United States,* 17 CIT 1185, 1187–88, 837 F. Supp. 437, 439–40 (1993); *see also Comitex Knitters, Ltd. v. United States,* 16 CIT 817, 824, 803 F. Supp. 410, 416 (1992). NSK's allocation methodology failed to establish a direct relationship between the urgent delivery commissions and the sales under consideration. Therefore, Commerce's decision to deny the adjustment to FMV for NSK's urgent delivery commissions is supported by substantial evidence on the agency record.

4. *Clerical Error:*

NSK contends that at lines 273 and 287 of the computer program, unique home market parts are not identified because the language "BY HMPART" has been omitted. Pls.' Mem. Supp. Mot. J. Agency R. at 34. Commerce concedes that the language "BY HMPART" was inadvertently omitted from the computer program and agrees that a remand is necessary to correct the error. Def.'s Opp'n to Pls.' Mot. J. Agency R. at 27. Defendant-intervenor Timken submits that the error exists in more

lines of the computer program than those enumerated by NSK. Def.-Int.'s Opp'n to Pls.' Mot. J. Agency R. at 25–26.

Upon a review of the record, the Court agrees with the parties that a remand is necessary to correct the clerical error at issue to the extent necessary.

CONCLUSION

NSK's motion for judgment upon the agency record is granted to the extent that this case is remanded to correct the clerical error concerning home market parts. Commerce's Final Results, to the extent challenged herein, are sustained in all other respects.

The remand results are due within ninety (90) days of the date that this opinion is entered. Any comments or responses are due within thirty (30) days thereafter; any rebuttal comments are due within fifteen (15) days of the date that responses or comments are due.

(Slip Op. 96–54)

JOHN A. CARRIER, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–05–00706

(Dated March 13, 1996)

JUDGMENT

RESTANI, *Judge:* Upon remand following Slip Op. 96–36 (Feb. 13, 1996) issued herein, plaintiff was awarded a passing grade on the Customs broker examination. Plaintiff having now obtained the full compliment of relief which he sought by this action, further proceedings are not necessary and this matter is now dismissed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C96/15 3/12/96 Tsoucalas, J.	ABB Power Systems, Inc.	93–02–00135	8504.40.00 3%	8541.30.00 Duty free	Power Transmission *v.* United States (Slip Op. 95–141)	New Orleans Thyristor valve
C96/16 3/12/96 Tsoucalas, J.	The Brechteen Co.	90–02–00090, 92–02–00089, 93–04–00243, etc.	3917.10.10 6.6%	4823.90.85 5.3%	Vista International Packaging Co. *v.* United States Slip Op. 95–110 (June 14, 1995) Court No. 93–02–00074	Detroit Artificial sausage casings
C96/17 3/12/96 Tsoucalas, J.	Brechteen Company	93–07–00402, 94–03–00198, 94–10–00587	3917.10.10 6.6%	4823.90.85 5.3%	Vista International Packaging Co. *v.* United States Slip Op. 95–110 (June 14, 1995) Court No. 93–02–00074	Chicago Artificial fibrous sausage casings
C96/18 3/14/96 Tsoucalas, J.	Brechteen Company	94–11–00721, 95–05–00700, 95–11–01441	3917.10.10 6.6%	4823.90.85 5.3%	Vista International Packaging Co. *v.* United States Slip Op. 95–110 (June 14, 1995) Court No. 93–02–00074	Detroit Artificial fibrous sausage casings
C96/19 3/14/96 Tsoucalas, J.	Brechteen Company	95–01–00051	3917.10.10 6.6%	4823.90.85 5.3%	Vista International Packaging Co. *v.* United States Slip Op. 95–110 (June 14, 1995) Court No. 93–02–00074	Chicago Artificial fibrous sausage casings
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